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No. 80-1854

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CECIL A. BENJAMIN,

Petitioner,

vs.

FRANK J. MACCHIAROLA, Individually and as Chancellor of the Board of Education of the City of New York, and the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Court of Appeals, in affirming the District Court's granting of respondents' motion to dismiss petitioner's complaint, correctly determined that petitioner's

"discretionary exercise of his power as Principal to discharge two employees did not amount to an exercise of free expression under the Constitution."

STATEMENT OF THE CASE

Petitioner Cecil A. Benjamin is a tenured teacher of mathematics in the public school system of the City of New York (64a)*. On May 31, 1972, petitioner was appointed Acting Principal of Samuel Gompers Vocational High School, Bronx, New York. He served in that capacity until September 12, 1974, when he was appointed principal (64a). Pursuant to Section 2573(1)(b) of the Education Law of New York, enacted July 24, 1975, petitioner began his three-year probationary period as principal as of the date of enactment.

By letter dated July 18, 1978, respondent Chancellor Macchiarola informed petitioner of his decision not to grant him tenure (45a). The letter further advised that petitioner was entitled, under Section

*References are to pages of the Joint Appendix to the Second Circuit Court of Appeals.

5.3.4 of the Board of Education's By-laws, to a review of the procedures relevant to the termination of his probation (45a). On or about July 27, 1978, petitioner was notified, by certified mail, that the §5.3.4 review had been scheduled for August 7, 1978 (30a, 60a). Petitioner did not avail himself of that review (30a, 60a).

Petitioner then commenced an Article 78 proceeding in the Supreme Court of the State of New York, seeking judicial review of the Chancellor's determination and alleging that the denial of tenure was arbitrary and capricious (40a). By order entered September 11, 1978, the relief requested was denied (57a). Benjamin v. Macchiarola, Index No. 14025/78 [Sup. Ct. Kings Co., 1978]). The Appellate Division of the Supreme Court of New York, Second Department, affirmed the lower court's

order (58a) 67 AD 2d 974 (1979). In its decision, the Appellate Division held that petitioner had not exhausted his administrative remedies under the Board's by-laws and the petitioner's collective bargaining agreement. "Furthermore, he has raised allegations unsupported in the record" (58a). Those allegations included that petitioner was denied tenure in retaliation for his dismissal of two Taylor Law probationary teachers while principal of Samuel Gompers Vocational High School. Petitioner's motion for leave to appeal to the New York Court of Appeals was denied on June 5, 1979. 47 NY 2d 708.

Petitioner thereafter commenced the instant action in the District Court for the Southern District of New York. On respondents' motion for judgment on the pleadings, the District Court (WARD, D.J.) found that

petitioner had not been denied his due process rights either of property or liberty, first, because he had achieved neither formal tenure nor de facto tenure based on legitimate expectation of continued employment (92a-93a), and, second, because he suffered no stigmatization based simply on his failure to be accorded tenure. The District Court further found that the complaint made no allegations whatever which would support petitioner's claim of a denial of equal protection.

The question presented to this Court was raised by petitioner, not in his complaint, but in his and his attorney's affidavits in support of his cross-motion for summary judgment (2a-7a, 71a, 75a). The District Court noted that although a "§1983 claim can be founded on a discharge in retaliation for the employee's exercise of his first amendment rights, ... the

complaint fails to make any mention of an independent first amendment claim or to allege any facts which would support such a claim" (95a). Judge Ward further stated that it was not apparent how petitioner's activity in discharging the two teachers might be viewed as speech or expression within the first amendment (95a). The District Court granted respondents' motion for judgment on the pleadings.

The United States Court of Appeals for the Second Circuit affirmed the judgment dismissing the complaint concluding that "[a]s a probationary Principal, Benjamin had no tenure, either de facto or de jure, and no property entitlement to that position .... Nor can the termination be viewed, because of defendant Macchiarola's earlier statement that tenure must be 'earned', which did not refer to appellant personally, as stigmatizing or as an infringement of his liberty

interests" (Petition, Appendix A, p. 3a). The Circuit Court of Appeals also noted that petitioner had failed to pursue his administrative remedies.

With respect to petitioner's First Amendment claim, now the only question before this Court, the Court of Appeals stated (Petition, Appendix A, p. 3a).

> [Petitioner's] discretionary exercise of his power as Principal to discharge two employees did not amount to an exercise of free expression under the Constitution.

REASONS FOR DENYING A WRIT OF CERTIORARI

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S DISCRETIONARY EXERCISE OF HIS POWER AS PRINCIPAL TO DISCHARGE TWO EMPLOYEES DID NOT AMOUNT TO AN EXERCISE OF FREE EXPRESSION UNDER THE CONSTITUTION.

The determination of the Second Circuit Court of Appeals is consistent with this Court's decision in Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) in that the Circuit Court correctly concluded tnat petitioner failed to meet his initial burden of establishing that his conduct was constitutionally protected.

In Mount Healthy City School District Board of Education v. Doyle, id. at 287, this Court stated that a non-tenured teacher cnallenging his dismissal as violative of his First Amendment rights had the initial

burden of showing "that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' in the Board's decision not to rehire him." Petitioner has failed to establish how his conduct in discretionarily dismissing two teachers, in the performance of his duties as Principal, falls within the parameter of the First Amendment.

Although certain types of conduct had been held to constitute "speech" within the meaning of the First Amendment (see, e.g., Spence v. Washington, 418 U.S. 405 (1974) (displaying an American flag with a peace symbol thereon); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (wearing of black armbands to protest the war in Vietnam); Stromberg v. California 283 U.S. 359 (1931) (displaying a red flag as a symbol of opposition to organized government)), the conduct

alleged by petitioner to be protected by the First Amendment in no way communicates ideas or serves the purposes of self-expression, as did the conduct in the above-cited cases. Petitioner was merely doing his job as principal; his right to act was derived from his position as principal, lawfully conferred upon him by respondents, and not from the constitution.

Additionally, there is no evidence in the record, aside from petitioner's unsupported conclusory allegations in his cross-motion for summary judgment, to support petitioner's assertion that the dismissal of the two teachers influenced respondent Macchiarola's decision to deny him tenure.*

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*Petitioner's letter to his attorney, dated August 7, 1978 (Petition, p. 9; 83a-86a) is hardly conclusive evidence of this allegation as petitioner has argued (Petition, pp. 9, 13).

Consequently, the Court of Appeals properly determined that petitioner failed to establish that his conduct was protected by the First Amendment.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 15, 1981

Respectfully submitted,

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